

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

75-4207

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MILTON EVEREST MITCHELL,

Petitioner, :

-v- :

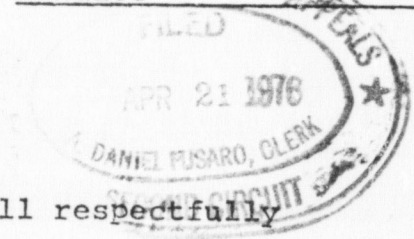
IMMIGRATION AND NATURALIZATION
SERVICE, :

Respondent. :
----- x

Docket No. 75-4207

Petition for Rehearing
and Rehearing In Banc

With Motion to Stay
Mandate



Petitioner Milton Everest Mitchell respectfully
petitions this Court, pursuant to Rules 40 and 35, F.R.A.P.,
for rehearing and rehearing in banc from the order of this
Court dated April 7, 1976, which denied his petition for
review of the order of deportation of the Board of Immi-
gration Appeals. Petitioner respectfully suggests that
this is an appropriate case for rehearing in banc.

Alternatively, petitioner respectfully moves this
Court, pursuant to Rule 41, F.R.A.P., for a stay of the
mandate pending the filing of a petition for a writ of
certiorari in the Supreme Court of the United States.

In support of this petition for rehearing, the
following is submitted:

1. The Court held that there was not the functional
equivalent of an inspection even though the immigration

A
B

authorities were skeptical and questioned petitioner about his citizenship claim. In so holding the Court overlooked the broader implications of such questioning and skepticism, which were indicative of a non-acceptance of the citizenship claim. In its memorandum judgment the Court apparently treated petitioner's argument that he had the "functional equivalent of inspection" as being limited to the Immigration authorities' skepticism and questioning of petitioner. Petitioner's contentions went far beyond this summary argument. The Immigration inspector's skepticism and questioning were merely the starting point of petitioner's inspection as an alien, within the meaning and requirements of Immigration regulations under 8 CFR 235.1(b), and pursuant to Reid v. INS, 420 U.S. 619(1975). It is the totality of the government's activities in doubting petitioner, in questioning him, in surveilling him from the moment of his entry, in procuring an arrest warrant at 4:00 p.m. and finally apprehending him at 5:00 p.m. while still within the port area, which make up the totality of petitioner's contention that he had the functional equivalent of an inspection as an alien.

2. The Court apparently failed to consider petitioner's fundamental argument that he should be afforded the opportunity to establish the pivotal question that there was a feigned acceptance of his claim of citizenship and that

because of such feigned acceptance his inspection as an alien was actually held. The inspection began when the doubts as to his citizenship claim manifested itself and culminated with his ultimate arrest in the immediate port area. The Court's memorandum opinion does not reflect that the question of petitioner's right to a reopened deportation hearing, to establish this pivotal question, was considered by the Court. In its limited consideration of petitioner's contentions, the Court apparently misapplied the holding of Reid, supra, which holding is also consistent with the Immigration Service's published regulations which recognize "acceptance of a false citizenship claim" as the pivotal question upon which turns the issue of entry with or without inspection as an alien. 8 CFR Part 235.1(b) provides as follows:

"(b) U.S. citizens. A person claiming U.S. citizenship must establish that fact to the examining immigration officer's satisfaction and must present a U.S. passport if such passport is required under the provisions of 22 CFR Part 53. If such an applicant for admission fails to satisfy the examining immigration officer that he is a U.S. citizen, he shall thereafter be inspected as an alien." (Emphasis supplied)

The Court overlooked petitioner's contentions that the circumstances of his continuous surveillance would buttress and support his arguments concerning the pivotal question of the non-acceptance of his false citizenship claim.

3. Petitioner contends that the time elements indicated in the Order to Show Cause and Warrant of Arrest, (Appendix 1A) and the Border Patrol Agent's Affidavit, (Appendix 25A) together strongly suggest that petitioner's six-hour surveillance must have begun at the very moment of his "entry". The circumstances of the government's questioning and skepticism of petitioner's claim as well as a continuous surveillance as aforesaid, make a substantial showing that petitioner's false citizenship claim was not accepted. The earlier questions and skepticism were the initial stages of inspection as an alien which was apparently deferred through a feigned acceptance of his citizenship claim; and thereupon the Service placed petitioner under a continuous six hours surveillance within the immediate port area. This de facto inspection was not terminated until petitioner was arrested and taken into custody. ~~By that time the immigration~~ authorities already had procured an arrest warrant charging him as an illegal alien. This indicates that the Service knew all along that he was an excludable alien. Petitioner moved for a reopened deportation hearing to establish that there was a feigned acceptance of his citizenship claim and that this long surveillance by immigration authorities was actually a continuation of his inspection as an alien. It was the failure to afford him such reopened hearing which is

the gravamen of petitioner's complaint that he was denied substantial due process of law.

4. Nowhere in the Court's memorandum judgment is any statement or reference made with respect to the denial to petitioner of voluntary departure in lieu of deportation. When we consider the awful consequences of permanent banishment which deportation creates, involving as here the permanent destruction of this United States citizen family unit, the failure of the Court to make any statement at all with respect to the Service's denial of voluntary departure requires that petitioner pray for rehearing and rehearing in banc for this reason alone, if for none other in this case. The action of the Immigration Judge in denying voluntary departure was grounded upon the flimsiest of "make-weight" reasons. The refusal of the Board of Immigration Appeals to overrule this holding on grounds of discretion was improper, since there was a complete lack of substantial evidence to support this determination. Petitioner submits that this Court has jurisdiction to remand this proceeding to the Immigration Service to enable petitioner to support and buttress his claim for the relief of voluntary departure, as well as to overcome the quicksand grounds of the Immigration Judge's determination not to grant such relief.

5. Petitioner respectfully moves in the alternative, pursuant to Rule 41(b) F.R.A.P., for a stay of the mandate pending the filing of a petition for a writ of certiorari in

the Supreme Court of the United States. This alternative relief is requested in the event that the petition for rehearing herein is denied by the Court. Petitioner believes that the issues in this case may require resolution by the Supreme Court of the United States. Accordingly, the mandate should be stayed to enable such review to be accomplished.

WHEREFORE, petitioner respectfully submits that the foregoing petition for rehearing and rehearing in banc be granted and that upon such rehearing the petition for review be granted in all respects.

Respectfully submitted

Dated: April 21, 1976

LEO E. YPSILANTI
Attorney for Petitioner

CERTIFICATE

I, LEO E. YPSILANTI, attorney for petitioner herein, do hereby certify that the foregoing petition for rehearing and rehearing in banc is not frivolous and is presented in good faith and not for purposes of delay.

LEO E. YPSILANTI
Attorney for Petitioner

NOTICE OF ENTRY

Sir:- Please take notice that the within is a
(certified) true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.

Attorneys for
Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a
true copy will be presented for settlement to the
Hon.
one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.

Attorneys for
Office and Post Office Address

To

Attorney(s) for

~~Index No.~~

Year 19

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UNITED STATES COURT OF APPEALS
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-v-

IMMIGRATION AND NATURALIZATION
SERVICE,

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Petition for Rehearing and
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LEO E. YPSILANTI

^x Petitioner

Attorneys for

Office and Post Office Address
225 Broadway

New York, N. Y. 10007

Tel. (212) 964-2055

To

Attorney(s) for

Service of a copy of the within

Dated,

is hereby admitted.

19

Attorney(s) for

ATTORNEY'S AFFIRMATION

STATE OF NEW YORK
COUNTY OF

ss.:

The undersigned, an attorney admitted to
practice in the courts of New York State, hereby
affirms as true under all the penalties of perjury
that affiant is

the attorney(s) of record for

in the within action; that affiant has read the fore-
going

and knows the contents thereof; that the same is
true to affiant's own knowledge, except as to the
matters therein stated to be alleged on information
and belief, and that those matters affiant believes
to be true. Affiant further says that the reason this
affirmation is made by affiant and not by

The grounds of affiant's belief as to all mat-
ters not stated upon affiant's knowledge are as fol-
lows:

Dated

19